Metropolitan Cases

Dewayne Cargill, et al. v. Metropolitan

Temporary workers filed three class action lawsuits challenging Metropolitan's use of District temporary employees, independent consultants and temporary agency workers in 1998. The three lawsuits, consolidated by the Los Angeles County Superior Court, seek regular employment status and full retroactive employee benefits for approximately 4,550 temporary workers. On October 10, 2005, and pursuant to Board authorization, the General Counsel entered into a settlement agreement resolving the Administrative Code portion of the *Cargill* temporary labor class action lawsuit (i.e., the non-pension benefits claims). The General Counsel has engaged in settlement discussions with counsel for Plaintiffs and CalPERS to resolve the pension, i.e., CalPERS, portion of the lawsuit. On March 14, 2007, the CalPERS Board will review a settlement proposal. This same proposal was presented to the Board on February 13.

Protect Our Water and Environmental Rights v. Imperial Irrigation District (POWER I) **(California Court of Appeals)**

In this state court lawsuit challenging the All-American Canal Lining Project, the Court of Appeal notified the parties in February 2007 that the record of trial court proceedings has been filed. This triggers the time periods for filing appellate briefs in the case. We anticipate that the plaintiffs-appellants who challenged the AAC Lining Project will ask for an extension of time to file their opening appellate brief which would make their brief due probably in April 2007. The appellate briefs of the water agencies will be filed thereafter.

QSA Related Litigation **(California Court of Appeals)**

The cases challenging the QSA and related agreements have been on hold for almost two years while an original writ proceeding arising from two of the County of Imperial's cases has been pending in the Court of Appeal. The County had petitioned the Court of Appeal for a writ after the trial court dismissed certain CEQA and water law claims in the County's lawsuits. Metropolitan received notice in February 2007 that the Court of Appeal has finally scheduled oral argument in this writ proceeding for March 21, 2007. After this hearing and after the Court of Appeal issues a decision (and assuming no further California Supreme Court review), this writ proceeding will finally end, and the QSA litigation in the trial court will start up again.

Soboba Band of Luiseño Indians v. Metropolitan **(U.S. District Court)**

On February 22, 2007, the Legal Department, along with attorneys for Eastern Municipal Water District and Lake Hemet Municipal Water District, met with representatives of the Tribe and the federal negotiating team, including the Secretary of the Interior's personal representative. The purpose of the meeting was to discuss the federal team's proposed changes to the settlement's authorizing legislation (the settlement requires the consent of Congress). Legislation sponsored by Representatives Bono, Lewis and Baca, which did not include the changes discussed at the February 22, 2007 meeting, was introduced on Thursday, March 1, 2007. The Tribe promised to work with the bill's sponsors to amend the bill to accommodate the federal team's changes.

AFSCME Local 1902 v. Metropolitan **(Public Employment Relations Board)**

On February 15, 2007, AFSCME Local 1902 lodged an unfair practice charge with the Public Employment Relations Board. The charge requests an order requiring the District to rescind any dress code requirement. In addition, the charge seeks to rescind a disciplinary action taken against an employee who reportedly insulted and demeaned the authority of a manager because the manager expressed the expectation that the employee dress appropriately for Board Committee meetings by wearing a jacket and tie. Metropolitan's position statement is due on March 12. The Legal Department will defend against the charge, including seeking a dismissal.

AFSCME Local 1902 v. Metropolitan **(Public Employment Relations Board)**

On August 9, 2006, AFSCME Local 1902 lodged an unfair practice charge with the Public

Employment Relations Board (PERB) challenging internal guidelines on travel expenses issued by Water System Operations Management on March 16, 2006. PERB issued a complaint on November 28, 2006, alleging that Metropolitan committed an unfair practice by making the following changes to its travel compensation policy: (a) Limiting the amount of time an employee has to submit a reimbursement claim; (b) requiring Desert employees traveling on overnight travel status, working in the Desert at a Desert facility, to stay at that facility if available or travel on "Actual Expenses"; (c) granting managers the right to determine whether an employee will be placed on overnight travel status; and (d) requiring Desert employees traveling outside of the Desert to be compensated by per diem. In response, the District maintained that the challenged actions are a valid exercise of Management's prerogative, and that the guidelines are consistent with the AFSCME Local 1902 MOU.

A settlement agreement dated February 14, 2006 was signed as a result of a PERB mediation. AFSCME Local 1902 withdrew the charge with prejudice. In exchange, Metropolitan agreed to install televisions and telephones in certain employee dormitory rooms at the Iron Mountain and the Gene Pumping Plants, and the District identified suitable hotel accommodations in the Indio area for employees staying overnight to perform work at the Hinds Pumping Plant.

Cases Involving Metropolitan

***Consejo de Desarrollo Economico de Mexicali v. United States (Federal All-American Canal Lining Case)* (U.S. Court of Appeals)**

In this federal court lawsuit challenging the All-American Canal (AAC) Lining Project, the U.S. Court of Appeals for the Ninth Circuit held a hearing on February 21, 2007 on the Federal defendants' motion to lift the Ninth Circuit's injunction. The Ninth Circuit issued this injunction in the fall of 2006 prohibiting any work on the AAC Lining Project until the court ruled on the appeal in the *CDEM* case. After Congress enacted legislation in December 2006 directing the Secretary of the Interior to carry out the AAC Lining Project without further delay notwithstanding any other laws, the Federal defendants filed their motion asking the Ninth Circuit to lift its injunction in light of this new legislation. The February 21, 2007 Ninth Circuit hearing on the Federal defendants' motion was unusual because hearings are not usually scheduled for motions in the federal appellate courts. Based on the questions asked by the Ninth Circuit judges at the hearing, the proponents of the AAC Lining Project are optimistic that the motion will be granted. However, the Ninth Circuit did not issue a ruling on the motion, and took the matter under submission. There is no fixed time by which the court must act on the motion.

***Pacific Coast Federation of Fisherman's Assns. v. Gutierrez* (U.S. District Court)**

Plaintiffs challenged an Endangered Species Act biological opinion that provides federal incidental take authorization for operation of both the Central Valley Project and the State Water Project. Two motions were filed in February to dismiss portions of the complaint. Defendant United States, joined by the Westlands Water District, has moved to dismiss the allegation that the U.S. Bureau of Reclamation failed to comply with the National Environmental Policy Act when adopting the Operations Criteria And Plan (OCAP). A second motion filed by the California Farm Bureau, joined by the State Water Contractors, seeks to dismiss the allegation that the results of an "informal consultation" contained in the National Marine Fisheries Service's Biological opinion on future actions - i.e., the Department of Water Resources South Delta Improvement Program and implementation of the Napa Proposal—is invalid. The motions will be heard in Fresno on March 26, 2007.

Petition to Revise the Status of the Delta Smelt to Endangered under California's Endangered Species Act

A coalition of environmental groups petitioned the Department of Fish and Game to change the status of the delta smelt from "threatened" to "endangered" under California's Endangered Species Act (CESA) on February 7, 2007. The smelt has been listed as threatened under both CESA and the federal ESA since 1993. Since the listing, the State Water Project and Central Valley Project have been subject to significant operational restrictions to protect the delta smelt. In recent years the smelt and other pelagic species (species that live in open water) have suffered an unexplained decline in numbers, apparently

prompting the petition, but it is not clear that the recent decline is related to project operations. A petition submitted by some of the same environmental groups to the United States Fish and Wildlife Service in March 2006 to designate the smelt as endangered under the Federal ESA is still pending. Staff, along with staff of other State Water Contractors and the Department of Water Resources, is reviewing the petition to determine what actions should be taken in response to the petition.

California Farm Bureau Federation, et al. v. State Water Resources Control Board

The State Water Resources Control Board (SWRCB) has petitioned the Third District Court of Appeal for a rehearing on its opinion invalidating portions of water users fee regulations adopted by SWRCB. As reported in the General Counsel's monthly report for December 2006, the Court of Appeal held that while the statute under which SWRCB adopted the fees was valid on its face, the fee regulations were invalid as applied.

Cases to Watch

Supreme Court Holds that Public Officials May Not Rely on Government Attorney's Advice as a Defense to Section 1090 Criminal Prosecution

A February 2007 opinion of the California Supreme Court, *People v. Maria Socorro Chacon*, (40 Cal.4th 558; 2007 Cal Lexis 1112) holds that a public official may not use reliance upon the advice of his or her agency's counsel as a defense in a criminal prosecution for an alleged violation of Government Code section 1090. Government Code section 1090 prohibits members of a governing public body, as well as the body on which they serve, from participating in the making of contracts in which a member of the body has a financial interest. In *Chacon,* a city council member was selected by the city council to be the city manager while she was still serving on the council. In the criminal proceeding for violation of section 1090, the council member raised her reliance upon the advice of the city attorney that the arrangement was legal as a defense. California courts have consistently held that reliance on the advice of counsel is no defense against a violation of section 1090. However, Chacon contended that the city attorney's advice was a basis for entrapment by estoppel, a defense which has been asserted by ordinary citizens claiming government entrapment. The Supreme Court held that, as a public official, the city council member was obligated to "discharge her responsibilities with integrity and fidelity" (2007 Cal Lexis 1112, 25*) and could not rely on this defense. The opinion can be viewed at http://www.courtinfo.ca.gov/opinions/documents/S125236.PDF

United States v. Atlantic Research Corp. **(U.S. Supreme Court)**

The U.S. Supreme Court recently granted certiorari in *United States* v. *Atlantic Research Corp.*, an Eighth Circuit case that raises the question of whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 107(a) gives potentially responsible parties the opportunity to seek contribution from other responsible parties to clean up sites before the EPA formally commences an enforcement action. For the water supply industry, a broad reading of CERCLA, allowing parties to begin cleanup activities for sites, including contaminated groundwater supplies, and then seek contribution from other responsible parties is preferable. Such a policy would encourage parties to be proactive and take measures to prevent the spread of contamination without waiting for EPA to go through the lengthy process required to designate a Superfund site. The ACWA Legal Committee recently recommended that ACWA participate in an amicus brief in the matter supporting the broader interpretation. Argument in the case is scheduled to be heard in April. http://www.supremecourtus.gov/docket/06-562.htm

Mt. San Jacinto Community College District v. Superior Court (Azusa Pacific University) **(California Supreme Court)**

The California Supreme Court issued an important eminent domain ruling on February 22 and unanimously ruled in favor of the position taken by Metropolitan in an amicus brief filed with the court. The case, *Mt. San Jacinto Community College District v. Superior Court (Azusa Pacific University)*, raised constitutional challenges to California's "quick take" eminent domain procedures. The California constitution authorizes the state Legislature to enact procedures for a condemning agency to take possession of property prior to completion of the eminent domain proceedings. As a condition for this early

possession, the condemning agency must deposit with the court an amount determined by the court to be the probable amount of just compensation. This money must be promptly released to the property owner. The procedures adopted by the Legislature provide that the date of deposit sets the valuation date for the acquisition, and that withdrawal of the deposit by the owner waives any challenge to the condemnor's right to take. In this case, the owner (Azusa Pacific University) challenged both conditions as violating the constitutional guarantees of just compensation and prompt release of the compensation.

The condemnor, Mt. San Jacinto Community College District, deposited the probable compensation amount soon after filing the eminent domain action. However, the owner challenged the condemnor's right to take the property, which precluded it from withdrawing the deposit without waiving this challenge. The right-to-take challenge was not resolved for more than a year following commencement of the lawsuit, during which time property values had significantly increased. After the right-to-take challenge was rejected, the owner sought to move the date of valuation to the beginning of trial to recover the increased value of the property. This effort was rejected by the lower court. The owner sought a hearing by the Supreme Court asking that the statutory procedures be declared unconstitutional. Metropolitan filed an amicus brief in support of the condemnor jointly with the League of California Cities and the California State Association of Counties. The quick take procedures are very important to prevent delays in construction of public projects, which could otherwise be held up for years pending resolution of eminent domain disputes.

The Supreme Court upheld the statutory provisions governing immediate possession in eminent domain actions. It found that there were statutory safeguards in place, including provisions for payment of interest on the deposit of probable compensation, that protect the owner's constitutional right to just compensation.

Items of Interest

Staff training on the department's new system for tracking non-electronic files was completed. The new system provides a centralized database for cataloguing, retrieving, and archiving hard-copy files.

The Annual Statement of Economic Interest forms were distributed to directors and designated staff. The designated staff notices were distributed electronically this year, producing a savings of staff time and materials.